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BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, DC

LOVE FIELD SERVICE INTERPRETATION PROCEEDING	)))	Docket OST-98-4363 – 8

PETITION FOR RECONSIDERATION OF ORDER 98-8-29 AND MOTION FOR ENLARGEMENT OF TIME OF THE DALLAS-FORT WORTH INTERNATIONAL AIRPORT

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September 1, 1998

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, DC

LOVE FIELD SERVICE INTERPRETATION PROCEEDING	)))	Docket OST-98-4363

PETITION FOR RECONSIDERATION OF ORDER 98-8-29
AND MOTION FOR ENLARGEMENT OF TIME OF
THE DALLAS-FORT WORTH INTERNATIONAL AIRPORT

The Dallas/Fort Worth International Airport ("Dallas/Fort Worth"), pursuant to Rules 37 and 17 of the Department's Rules of Practice (14 CFR §§ 302.37, 302.17), hereby petitions for reconsideration of Order 98-8-29 and an enlargement of the time period for filing responsive comments. Dallas/Fort Worth specifically requests that Issue 4 regarding the DFW Airport Use Agreement be deleted, and that a new issue be added dealing with Continental's holding out of nationwide Love Field service on its Love-Houston flights. To allow the Department time to consider this Petition, Dallas/Fort Worth submits that the Department should act immediately and rule that the due date for comments be enlarged to the later of October 8, 1998, or 30 days after the Department rules on this Petition.

In support whereof Dallas/Fort Worth states as follows:

1. Order 98-8-29, issued August 25, 1998, announces the Department's intention on its own initiative to issue an interpretative order ruling on certain alleged federal law issues arising under the Wright and Shelby Amendments, and the litigation in Texas state courts instituted after passage of the Shelby

Amendment in 1997. The Department's Order does not come in response to any formal petition or complaint filed by any party; nor is there any case or controversy before the Department that requires such an interpretive order. The Order seeks comments from interested parties within two weeks -- by September 8, 1998.

2. The Order at page 4 identifies four so-called "federal law issues" on which the Department plans to rule. They deal with (1) whether the Cities' 1968 Bond Ordinance limiting interstate Love Field service falls within the proprietary rights exception in 49 U.S.C. 41713(b)(3); (2) whether the Wright and Shelby Amendments preempt any valid exercise of Dallas' proprietary rights; (3) whether the Shelby Amendment authorizes longhaul jet service from Love Field; and (4) whether the Use Agreements entered into by signatory carriers at DFW Airport that provide for Dallas/Fort Worth area service exclusively through DFW Airport somehow contravene federal aviation law. The Order does not explain how these four issues were selected for an interpretive ruling by the Department, or why other issues dealing with Love Field service were ignored.

3. Dallas/Fort Worth submits that no obvious federal law issue is presented by Issue 4 dealing with the DFW Use Agreement, and that on reconsideration Issue 4 should be deleted from consideration by the Department under Order 98-8-29. Issue 4 regarding the DFW Airport Use Agreement raises mainly state law questions of contract law; the principal issue litigated is whether

a corporate subsidiary can avoid the contractual obligations of its parent under the DFW Use Agreement; and no legitimate federal preemption issue has been raised in the state court litigation.

4. Issue 4 even as stated by the Department raises an unambiguous question of state contract not federal law: "Whether a major carrier may bind itself through its use agreements with the DFW Airport Board that it will not exercise the authority...:" Order 98-8-29, p. 4. The Use Agreement between the DFW Airport Board and certain airlines that operate at the Airport is a contract between the parties enforceable under state law. Whether an airline voluntarily entered into such a contractual obligation and whether it should be enforced is primarily a state law question.

Moreover, the central use in the dispute over the DFW Use Agreement raised in City of Fort Worth and American Airlines, Inc. v. City of Dallas, Texas, et. al, Tarrant County District Ct. No. 48-171109-97, the state court case in which the Use Agreement issue was raised, has nothing to do with federal law. The issue decided by Judge McCoy in granting a temporary injunction against Continental's proposed Love Field-Cleveland flights was not whether Continental Airlines signed the Use Agreement, but whether Continental could somehow shirk its contractual obligations by operating at Love Field through its subsidiary, Continental Express, Inc. The principal legal issues decided are state law issues: principal/agency relationships, alter ego, joint venture,

etc. No federal law issue involving the DFW Use Agreement as distinguished from the 1968 Bond Ordinance which the Use Agreement enforces has yet to be presented for decision by Judge McCoy. Therefore, any Departmental ruling on the DFW Use Agreements would be unnecessary and presumptuous at best at this time.

5. Nor is there need for any Department ruling whether a carrier can agree contractually with an airport not to exercise certain aspects of its federal authority. That issue was squarely decided by the federal courts in Western Air Lines, Inc. v Port Authority of New York & New Jersey, 658 F.Supp. 952, 958 (S.D.N.Y. 1986), aff'd, 817 F.2d 222(2nd Cir. 1987), in which the Court of Appeals upheld the Port Authority's enforcement of its La Guardia perimeter rule as a valid exercise of the Port Authority's proprietary rights as a multi-airport owner. Clearly the federal courts have already ruled with an airport, the Port Authority, that enforcement of its perimeter rule could properly limit carriers' federal certificates to serve any domestic U.S. destination from La Guardia. Nonstop flights from La Guardia to Salt Lake City and other points more than 1,500 miles from New York City were barred, despite the carriers' federal certificates authorizing unrestricted domestic service.

The Department's certificates of public convenience and necessity are not violated by every exercise of local proprietary powers and every contractual obligation that impact on a carriers' right to operate. Were this the case, the following would all be

invalid as inconsistent with carriers' federal certificates: the LaGuardia and Ronald Reagan Washington National perimeter rules; the slot rules at Washington National, O'Hare, White Plains, and Orange County; aircraft size restrictions at facilities such as Kansas City's downtown airport; and innumerable other instances in which an airport has exercised the local proprietary powers expressly preserved by the Deregulation Act.

6. Finally, any federal preemption issue raised by enforcement of the DFW Airport Use Agreement provisions (voluntarily entered into by Continental and other signatory carriers) against a federally-certificated carrier comes within the Supreme Court's holding in American Airlines, Inc. v Wolens, 115 S.Ct. 817, 827 (1995)(hereinafter "Wolens"); there is no need for any Department advisory opinion to guide the state court on applicable federal law. In Wolens, the Court noted that plaintiffs' action in that case for common law breach of contract directly involved "routes, rates and services" of the airline. Id. However, focusing on the terms "enact or enforce any law" as prohibited by the Deregulation Act's preemption provision, the Court held that the breach of contract claims were not preempted, because terms and conditions of a contract are "privately ordered obligations" not amounting to a State's "enact[ment] or enforce[ment]" of any law, rule, regulation or other provision having the force and effect of law. Id. at 820. The Court further stated: "The [ADA] preemption clause leaves room for suits alleging

no violation of state-imposed obligations, but seeking recovery solely for the airline's breach of its own self-imposed undertakings.. .A remedy confined to a contract's terms simply holds parties to their agreements..." Id.

Dallas/Fort Worth's enforcement of the Use Agreement is based on the airlines' breach of their own, self-imposed, contractual undertaking in entering into the Use Agreement. As such, Wolens controls: the Use Agreement is clearly not preempted by the Deregulation Act. Any attempt to distinguish this case from Wolens by asserting that Dallas/Fort Worth's attempt to prevent Continental or any other signatory carrier from operating interstate flights from Love Field necessarily requires interpretation and application of the Bond Ordinance, the Wright Amendment and the Shelby Amendment cannot be sustained.

Dallas/Fort Worth is not attempting to enforce the Bond Ordinance as a state-imposed law or regulation "external" to the agreement. The Use Agreement expressly incorporates the terms of the Bond Ordinance as additional terms of the Agreement. Thus, the terms of the Ordinance became a "self-imposed contractual undertaking" by the airlines' own agreement.

For the above-stated reasons, there is no need or basis for a Department advisory opinion on the DFW Airport Use Agreement, and Issue 4 should be deleted from the list of issues that the Department proposes to rule on.

7. On reconsideration, the Department should also address as an additional issue whether Continental's holding out of service from Love Field on its Love Field-Houston flights to any U.S. point violates the prohibition in the Wright Amendment (as modified by the Shelby Amendment) against selling tickets to points beyond the seven-state Love Field service area. Dallas/Fort Worth believes that Department's interpretation prohibiting such sales in Order 85-12-81 was clear; however Continental in connection with its new Love Field-Houston service is holding-out service to destinations beyond the seven-state area via connections at Houston. A recent example of Continental's advertising is attached as Exhibit 1.

In Order 85-12-81 the Department ruled that a carrier cannot hold-out, display or sell Love Field service to beyond destinations. "Continental's second question...is whether a carrier can display in a computer reservation system under 'connections' service from Love Field to a point beyond the restricted service area. The answer is no. The Conference Report is clear on this question." Id., p. 12. The Department went on to rule that Continental and other carriers could not avoid the Love Field Amendment's restrictions by operating via another point in Texas --

> "[C]arriers could not evade the Amendment's restrictions by providing flights, for example, between Love Field and Houston and then continuing the flights between Houston and points outside the five-state area... In our view, an air carrier providing interstate service within the authorized four-state service area may provide intrastate service

> from Love Field... However, the carrier cannot offer, promote or sell through service and fares or tickets between Love Field and points outside the authorized service area using another Texas city as the connecting point.' Order 85-12-81, pp. 13-14.

8. Continental may argue that it may operate nationwide from Love Field with regional jets as authorized by the Shelby Amendment. Assuming arsuendo the Shelby Amendment authorizes long-haul, nonstop service from Love Field under the commuter exemption -- a position with which Dallas/Fort Worth strongly disagrees -- Continental is not operating long-haul flights at Love Field with regional jets. It is operating short-haul flights with regional jets to Houston where passengers connect with larger jets operated by Continental for flights to other U.S. cities, many of which are outside the seven-state service area. This type of practice appears to be clearly prohibited by Order 85-12-81. It is unaffected by the Shelby Amendment under any reading, and the Department should so rule.

We propose that new Issue "X" should be stated as follows:

> (X) Whether a major carrier violates the Wright Amendment's prohibition on the offer, promotion and sale of through service or tickets between Love Field and points outside the authorized service area if it uses another Texas city as the connecting point for such service and operates between Love Field and the other Texas city using regional jets?

The Department should rule on this question of interpretation of the Love Field Amendment. As Continental is currently offering such Love Field service, a prompt ruling addressing the lawfulness of Continental's conduct is essential.

9. To allow the Department sufficient time to consider and rule on Dallas/Fort Worth's Petition, Dallas/Fort Worth requests pursuant to Rule 17 that the Department immediately extend the due date for the filing of comments to the later of October 8, 1998, or 30 days after the Department rules on this Petition.

Comments are currently due September 8, 1998, Under the present schedule there is clearly inadequate time for the Department to consider Dallas/Fort Worth's Petition and for interested parties to submit comments on the revised issues should the Petition be granted. Additionally, should the Department exclude Issue 4 as requested by Dallas/Fort Worth, without a postponement parties will have needlessly addressed this question; if the Petition is granted they will be spared the need to analyze the issue at this time.

Dallas/Fort Worth also submits that two weeks is an insufficient amount of time for parties to comment on such complex issues. While some of the issues have been addressed in litigation, others have not -- at least not the precise federal law issues identified by the Department. We believe it would be appropriate for parties to have a minimum of 30 days from the date the Department rules on Dallas/Fort Worth's Petition to comment;

this would appear to us to be an adequate period of time for parties to respond to the revised statement of issues, while allowing the Department sufficient time to render an interpretative order.

10. Dallas/Fort Worth further urges the Department to establish an accelerated procedural schedule to rule on Dallas/Fort Worth's Petition so that an Order on Reconsideration could be issued during the week of September 7, 1998. Therefore, Dallas/Fort Worth urges that Friday, September 4 at 3 p.m. be established as the answer date and Tuesday, September 8 at noon as the reply date; and that parties filing answers and replies serve their pleadings by fax on other parties. Dallas/Fort Worth is therefore serving this Petition by fax on all parties listed on the Service List attached to Order 98-8-29.

WHEREFORE, Dallas/Fort Worth respectfully requests that the Department grant this Petition for Reconsideration of Order 98-8-2% and on reconsideration delete Issue 4 dealing with the DFW Airport Use Agreement; add a new issue for consideration concerning Continental's holding out and sale of nationwide service from Love Field via its Houston hub on its Love Field-Houston flights; and establish the new due date for comments as the later of October 8, 1998 or 30 days after the Department rules on this Petition.

To expedite consideration of this Petition in light of the current September 8 due date for comments, Dallas/Fort Worth request that the Department set September 4, 1998 at 3 p.m. as the due date for answers to this Petition

Respectfully submitted,

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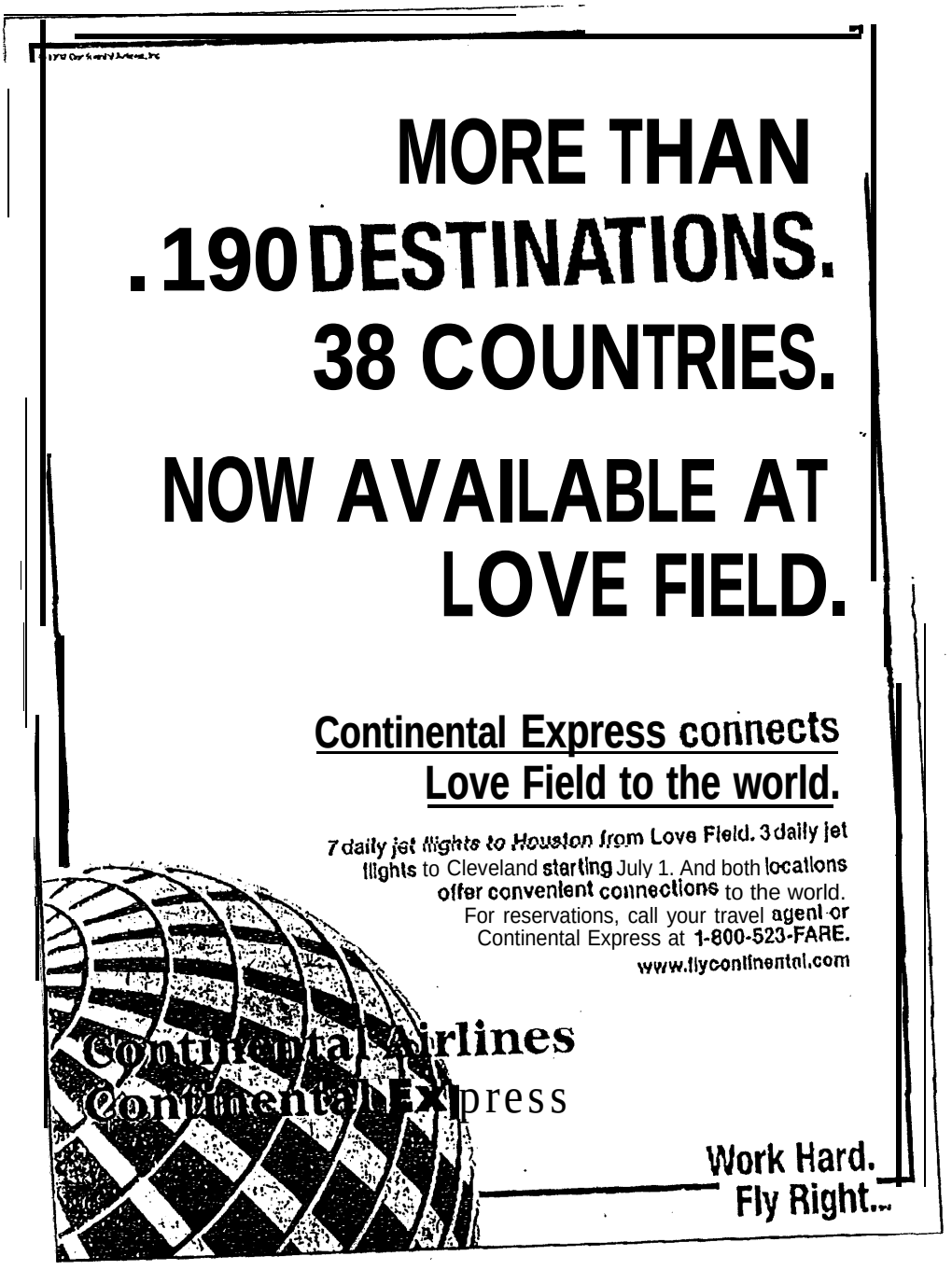
September 1, 1998

EXHIBIT 1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CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of September, 1998 served a copy of the foregoing document by facsimile and first class mail on all persons on the attached service list.

Michael F. Goldman

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